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No. 03-701

In The

Supreme Court Of The United States

JAMES S. AND REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE HONORABLE JOHN J. DUNCAN, JR. IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, this brief is submitted on behalf of the Honorable John J. Duncan, Jr., as amicus curiae, pursuant to Rule 37 of the Rules of this Court. The Honorable John J. Duncan, Jr. is the Chairman of the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure, which has jurisdiction over the Clean Water Act and responsibility for oversight over the implementation of that Act. In that role, Congressman Duncan has a substantial interest in the administration of the Clean Water Act and in ensuring that the Act is administered in a way that is consistent with the intent of Congress and fair to landowners and others who are regulated under the Act. [1]

SUMMARY OF ARGUMENT

To uphold the assertion by the U.S. Army Corps of Engineers ("Corps") of jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251-1387, over land at issue in *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) ("*Deaton*"), the U.S. Court of Appeals for the Fourth Circuit has interpreted the Act to provide broad authority to the Corps to determine the scope of its jurisdiction with only the goals of the Act to guide the Corps' decision-making. Under this authority inferred by the Fourth Circuit, the Corps may, on a case-by-case basis, and without notice and comment, effect a significant expansion of the jurisdiction of the United States under the Clean Water Act. This decision has contributed to

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amicus curiae* or his counsel, made any monetary contribution to the preparation or submission of this brief.

widespread confusion over the extent of federal regulation and is in clear conflict with the ruling of the U.S. Court of Appeals for the Fifth Circuit in *Needham v. United States*, ____ F.3d ____, 2003 WL 22953383 (5th Cir. 2003) ("*Needham*").

According to the Fourth Circuit, the jurisdiction of the Clean Water Act extends to "any branch of a tributary system that eventually flows into a navigable body of water," *Deaton*, 332 F.3d at 711. Federal regulations provide no definition of the term "tributary." The court below held that, "the word 'tributaries' in the regulation [of the Corps] *means what the Corps says it means.*" *Id.* (emphasis added). The Corps' exercise of this discretion must only seek to advance the broad goals of the Act[2] and, to receive deference from a reviewing court, the Corps' interpretation of what constitutes a "tributary" need only be consistent with the dictionary definition of that word.[3]

This reasoning gives the Corps virtually unfettered discretion to determine that a parcel of land is adjacent to a tributary of a water of the United States, and therefore is itself subject to federal jurisdiction as a water of the United States. At present, landowners cannot know what activities they may lawfully undertake on their property without consulting with the Corps, and are at the mercy of arbitrary decisions by regulatory officials.

In short, the Corps' regulations defining the scope of its jurisdiction under the Clean Water Act are ambiguous, and the Fourth Circuit has given the Corps essentially free reign to interpret its jurisdiction in an expansive manner,

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[2] *Deaton*, 332 F.3d at 707 (quoting the goals of the Act), 712 (noting the breadth of Congressional concern over water quality).

[3] *Id.* at 710-11.

resulting in confusion and uncertainty among the regulated community. The Corps has now abandoned any effort to address this confusion and uncertainty on its own, leaving it to the courts to provide clarity. However, the lower courts are clearly divided on the scope of the Corps' jurisdiction. As a result, this Court now truly represents the court of last resort to bring much-needed clarity to the Clean Water Act jurisdictional muddle.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY INTERPRETED THE STRUCTURE AND OPERATION OF THE CLEAN WATER ACT

As this Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANNC*"), in enacting the Clean Water Act in 1972, Congress had in mind the protection of traditional navigable waters. However, the Fourth Circuit has ignored the clear guideposts set out by this Court in *SWANNC* and as a result has misinterpreted the jurisdictional scope of the Clean Water Act. In doing so, the Fourth Circuit has given the Corps great discretion in interpreting its jurisdictional reach in particular cases.

The Clean Water Act prohibits the discharge of any pollutant by any person without a permit under the Act. 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Deatons in this case were alleged to have discharged a particular type of pollutant – dredged or fill material – into navigable waters without a permit under Section 404 of the Act, 33 U.S.C. § 1344, which authorizes the Corps to issue permits for such

discharges to navigable waters. The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps has sought to further define the jurisdictional scope of the Clean Water Act for the purposes of implementing section 404 by promulgating a definition of "waters of the United States." 33 C.F.R. § 328.3(a).[4] Under this regulation, "waters of the United States" covers a wide range of water bodies and wetlands, including waters that are currently used, used in the past, or susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide (*i.e.*, traditional navigable waters) (*id.* § 328.3(a)(1)); interstate waters including interstate wetlands (*id.* § 328.3(a)(2)); all other waters the use, degradation or destruction of which would affect interstate or foreign commerce (*id.* § 328.3(a)(3)); all impoundments of waters otherwise defined as waters of the United States (*id.* § 328.3(a)(4)); tributaries of waters identified in paragraphs (1) through (4) (*id.* § 328.3(a)(5)); the territorial seas (*id.* § 328.3(a)(6)); and wetlands that are adjacent to any of the waters identified in paragraphs (1) through (6) (*id.* § 328.3(a)(7)).

In this case, the Corps asserted federal jurisdiction over the petitioners' property on the grounds that it is a wetland adjacent to a tributary of a water of the United States.[5] The Corps' regulation provides no definition of the

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[4] The regulations of the U.S. Environmental Protection Agency ("EPA") include the same definition. 40 C.F.R. § 230.3(s).

[5] *Deaton*, 332 F.3d at 712. Before January 2001, the Corps used its definition of waters of the United States to assert jurisdiction over virtually any land that exhibited the soils, vegetation and hydrology that are characteristic of wetlands. Once these characteristics were established, the Corps could simply allege an impact on interstate or

term "tributary." However, through a series of conclusory arguments, the court below affirmed the Corps' jurisdictional determination by holding that the Clean Water Act confers upon the Corps the broad authority to determine what is a "tributary" of a navigable water, as long as the assertion of federal jurisdiction serves to further the goal of attaining and maintaining the quality of the Nation's waters.

The analytical path traveled by the court below is essentially as follows: *whereas* "[t]he power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is *necessary* to achieve Congressional goals in protecting navigable water," *Deaton*, 332 F.3d at 706 (emphasis added), and *whereas* "[a]ny pollutant or fill material that degrades water quality in

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foreign commerce under 33 C.F.R. § 328.3(a)(3) to establish federal jurisdiction. However, in January 2001, this Court called into question whether federal regulation extended to all waters the use, degradation or destruction of which would affect interstate or foreign commerce. *SWANCC*, 531 U.S. at 172-73 (requiring import to be given to the term "navigable" and noting the outer limits of Congress' power under the Commerce Clause). Following the publication of that opinion, the Corps more often has asserted jurisdiction over land that exhibits wetland characteristics on the basis that it is a tributary of a navigable water, or adjacent to a tributary of a navigable water. Indeed, following *SWANCC*, most of the lawsuits involving landowners who disagreed with the assertion of jurisdiction over their property by the Corps have involved assertions of jurisdiction based on allegations that the property is adjacent to a tributary of a navigable water. *See, e.g., Newdunn Associates, LLP v. U.S. Army Corps of Eng'rs*, 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (Oct. 27, 2003)(No. 03-637) (assertion of jurisdiction based on allegation that land was adjacent to a tributary of a navigable water); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (Dec. 22, 2003) (No. 03-929) (same). Accordingly, the meaning of the term "tributary" has taken on increasing significance.

a tributary of navigable water has the potential to move downstream and degrade the quality of the navigable waters themselves," *id.*, and *whereas* the goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), *quoted in Deaton*, 332 F.3d at 706, and *whereas* Congress delegated to the Corps of Engineers and EPA "the job of getting this done," *Deaton*, 332 F.3d at 706, *therefore*:

> This use of delegated authority [by regulating nonavigable tributaries and their adjacent wetlands] is well within Congress's traditional power over navigable waters.

Id.

The import of this analysis is that a delegation of authority to the Corps (using the goals of the Act as the only intelligible principle to guide the agency's decision-making) is within Congress's power, and that the Clean Water Act is properly interpreted as a delegation from Congress to an executive branch agency to do *whatever it takes to get the job done* in restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.

That is not what the Clean Water Act says. The Clean Water Act carefully prescribes – in ninety-four separate sections – how the goals of the Act are to be implemented.[6] An implementing agency and a reviewing

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[6] *See, e.g.*, 33 U.S.C. §§ 1251-74 (research and grant programs); *id.*, §§ 1291-1301 (construction grants for publicly owned treatment works); *Id.* § 1329 (assistance for the management of unregulated nonpoint sources); *id.* § 1342 (permitting program for point source discharges, with exemptions); *id.* § 1344 (permitting program for discharges of dredged and fill material, with exemptions). The United States has recently recognized that "[t]he Clean Water Act addresses the problem of

court must use the specific terms of the Clean Water Act to determine the Act's jurisdictional scope, not the broad goals of the Act. As this Court has long recognized:

> No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987).[7]

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water pollution control through a multi-faceted federal-state approach," with different sections of the Act addressing different aspects of the problem. Brief for the United States as Amicus Curiae Supporting Petitioner, *South Florida Water Management District v. Miccosukee Tribe of Indiana,* No. 02-626 (filed Sept. 10, 2003), at 3.

[7] Section 402(p) of the Clean Water Act provides a good example of legislative choice. Section 402(p) requires municipalities to bring storm water discharges from municipal separate storm sewer systems under Clean Water Act regulation over time and to regulate those discharges "to the maximum extent practicable." 33 U.S.C. § 1342(p). Allowing municipalities time to come into compliance and establishing a separate, "maximum extent practicable" standard for these discharges from the ditches and storm sewers in our cities and suburbs that convey drainage and runoff to navigable waters demonstrates the choice made by Congress to subject discharges from these types of conveyances to less regulation than discharges from industrial sources. However, this legislative intent could be completely upset by the decision of the lower court. Under the rationale of the decision below, municipal separate storm sewer systems could themselves be considered waters of the United States, prohibiting unpermitted discharges into those sewers and

As this Court noted in *SWANCC*, Congress provided an intelligible principle to guide the Corps' determination of the meaning of the term "waters of the United States."[8] However, that principle is not the goals of the Act. Rather, it is "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172. This does not mean that only traditional navigable waters are jurisdictional. However, it does mean that the Corps and reviewing courts must consider how all sections of the Clean Water Act work together to protect navigable waters and that, given statutory[9] and constitutional[10] constraints, the Corps – and the courts –

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requiring the water in the sewer itself to meet water quality standards, resulting in far more extensive regulation than that contemplated by section 402(p) of the Clean Water Act. *Cf. United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997) (holding that a drainage ditch that was part of a storm drainage system was a tributary of a navigable water even though it was man-made).

[8] Amicus does not contend that the Clean Water Act violates the nondelegation doctrine. *Cf. Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (finding no intelligible principle to guide agency-decision making, in violation of art. I, § 1 of the United States Constitution); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (same).

[9] *See SWANCC*, 531 U.S. at 166-67 (noting that in the Clean Water Act, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.'").

[10] *See SWANCC*, 531 U.S. at 174 (noting that the exercise of federal jurisdiction over land and water can raise "significant constitutional questions").

may not expand federal jurisdiction over land and water resources beyond that which is necessary to protect traditional navigable waters.

By relying solely on the goals of the Act as the principle to guide agency decision-making, the decision below ignores the specific authorities established by Congress in the Clean Water Act that protect navigable waters. The Fourth Circuit appears to believe that the only regulatory tool available to protect the quality of the Nation's waters is a finding that a ditch or other conveyance, through which pollutants may be transported to navigable waters, is itself a "water of the United States." Most significantly, the Fourth Circuit has ignored the role that section 402 of the Act, 33 U.S.C. § 1342, plays in protecting navigable waters from pollution.

Section 402 of the Act authorizes and regulates permits for the discharge of pollutants from point sources. The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The point source itself is not a "water of the United States." It is the discharge from the point source *into* waters of the United States that is regulated. This regulatory structure imposes federal authority at the proper place to protect the federal interest in navigable waters without infringing upon the use of private property and other land and water uses traditionally regulated by States, *i.e.,* the point of discharge into navigable waters.

Consistent with this structure, a ditch constructed in upland areas is not a water of the United States. *E.g. See* 33

C.F.R. § 323.4(a)(1)(iii)(C)(1)(i). However, under the Clean Water Act, a discharge of a pollutant *from* a ditch *into* navigable waters may be regulated and may require a Clean Water Act permit. For example, in *Needham,* the Fifth Circuit found that a regulated discharge had occurred without determining that non-navigable ditches and channels were waters of the United States. 2003 WL 22953383 (5th Cir. 2003). In that case, which was brought under the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701-20, oil spilled into a non-navigable drainage ditch that was not adjacent to a navigable water. The court indicated that this discharge would not be regulated under OPA or the Clean Water Act. 2003 WL 22953383 at *3. However, when the oil moved from the ditch and discharged into Bayou Folse (a primary tributary of a navigable-in-fact water), the release of oil became regulated under the OPA. *Id.* at *4.[11]

Under the Clean Water Act, it is not necessary to find that ditches, sewers, or other conveyances are themselves waters of the United States to protect navigable waters from discharges of pollutants from those conveyances. Sections 301 and 402 of the Act regulate these discharges. Moreover, the Clean Water Act is not a grant of plenary authority to the Corps "to get the job done." Without the ability to rely on these assumptions, the logic of the decision below falls apart and its finding that the Corps may regulate virtually any area of land or water as a "tributary" of a navigable water, as long as that regulation advances the goals of the Clean Water Act, is clear error.

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[11] *See* 33 U.S.C. § 2702 (imposing liability on persons responsible for the discharge of oil from a facility into navigable waters).

II. THE DECISION BELOW WOULD GRANT CORPS OFFICIALS THE AUTHORITY TO GREATLY EXPAND FEDERAL REGULATION OF LAND

After concluding its constitutional and statutory analysis, the court below held that the Corps' determination of what constitutes a "tributary" is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To determine whether the Corps committed error, the lower court did not consider any section of the Clean Water Act other than the goals of the Act. Instead, the lower court simply referred to the dictionary definition of the term "tributary."[12]

By referencing the dictionary definition, rather than the terms of the Clean Water Act, the court below has invited individual Corps officials to regulate anything that is "providing with or serving as a channel for supplies or additional matter" to a navigable water. *See Deaton*, 332 F.3d at 710 (*quoting Webster's Third New International Dictionary* (1993)). As the Fourth Circuit noted, "[a]ccording to this definition, 'tributary' in the regulation would encompass the entire feeder system for a navigable water because even a stream many branches away eventually provides 'additional matter' for the navigable water." *Id.* Unfortunately, this definition is not limited to streams and also would encompass all things through which or over which water flows, including sewer pipes, roads, driveways,

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[12] "Because the Corps's longstanding interpretation of the word 'tributary' has support in the dictionary and elsewhere, it is not plainly erroneous." *Deaton*, 332 F.3d at 711.

and even the ground, as well as the ditches at issue in *Deaton*.

Ironically, relying on this opinion, the Corps might well be able to assert jurisdiction over the isolated ponds at issue in *SWANCC*, because it is likely that some connection could be found between those ponds and navigable waters.[13] In fact, by providing a justification for the regulation of groundwater and land on which water falls and seeps into the ground, the decision below would support an expansion of federal jurisdiction over land that does not even exhibit wetlands characteristics, as long as any hydrologic connection to navigable waters (no matter how attenuated) could be found.

This concern is not speculative. In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) ("*Rice*"), the plaintiff alleged that the jurisdictional scope of the Oil Pollution Act (which applies to navigable waters and includes a definition of navigable waters that is identical to the definition in the Clean Water Act) extends to the release on dry land of oil that seeped into ground water. In *Rice*, the Fifth Circuit declined to find that the land at issue was subject to federal jurisdiction, but the reasoning of the Fourth Circuit in *Deaton* would support the opposite conclusion. *Compare Rice*, 250 F.3d at 269, 272 *with Deaton*, 332 F.3d at 710-11.

III. THE AGENCIES CHARGED WITH IMPLEMENTING THE CLEAN WATER ACT AND THE DECISION BELOW HAVE LEFT THE DETERMINATION OF THE

[13] Justice Stevens makes this point in his dissenting opinion in *SWANCC*. *See SWANCC* at 175, n.2 (Stevens, J. dissenting).

JURISDICTIONAL SCOPE OF THE ACT TO ARBITRARY AND INCONSISTENT CASE-BY-CASE DETERMINATIONS BY AGENCY OFFICIALS

Given its failure to constrain the Corps' discretion in a meaningful way, the decision below does not increase the clarity of the Corps' regulations defining the scope of its jurisdiction and will undermine any efforts to increase the level of consistency of its application. The decision gives the Corps unfettered discretion to determine that private property is adjacent to a tributary and therefore a "water of the United States." As exercised by individual agency officials, this discretion is fraught with the potential for error and abuse.

Concerns have already been raised about the arbitrary and inconsistent actions of regulatory officials implementing section 404 of the Clean Water Act. In October 2001, the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure held a hearing on the enforcement of section 404 by the Corps and EPA. Testimony at the hearing included allegations of arbitrary decision-making, intimidation, harassment, and abuse of discretion by agency officials charged with making the decisions regarding whether or not a piece of property is a "water of the United States."[14] In September 2002, the Subcommittee on Natural Resources and Regulatory Affairs

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[14] *The Wetland Permitting Process: Is It Working Fairly?:* Hearing Before the Subcommittee On Water Resources And Environment Of The House Committee On Transportation And Infrastructure, 107th Cong. 1st Sess. (2001) 43-93, 95-99 (statements of John Chaconas, John Conner, Charles Johnson, Donna Lovell, Robert Pierce, John Simpson, Doris Wilson, and Richard Adam).

of the Government Reform Committee held a hearing on agency implementation of the *SWANCC* decision. Witnesses at that hearing provided extensive testimony regarding inconsistent jurisdictional interpretations by agency officials.[15]

The Corps and EPA had originally taken steps to try to address the confusion and unfairness occasioned by inconsistent administration of the Act. Following this Court's decision in *SWANCC*, the Corps and EPA issued an advanced notice of proposed rulemaking ("ANPRM"), to initiate a rulemaking to clarify the scope of Clean Water Act jurisdiction. 68 Fed. Reg. 1991 (2003). In the ANPRM and an accompanying memorandum, the agencies noted the widely divergent interpretations of the lower courts regarding this Court's decision in *SWANNC* – including the conflicting decisions regarding jurisdiction over tributaries – and sought comment on the appropriate definition of what waters are "isolated" as well as other revisions to the Corps' jurisdictional regulations. On December 16, 2003, however, the Corps and EPA issued a press release announcing that they did not intend to proceed with this rulemaking. Senior officials from EPA held a press conference and were subsequently quoted as indicating that the agencies are content to let the courts address the jurisdictional confusion on a case-by-case basis. *See EPA, Appellate Decisions May Return Water Act Battle to High Court,* Inside EPA (Dec. 19, 2003) at 9. As a result, only the courts can provide any

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[15] *Agency Implementation Of The SWANCC Decision:* Hearing Before The Subcommittee On Energy Policy, Natural Resources And Regulatory Affairs Of The House Committee On Government Reform, 107th Cong., 2d Sess. (2002) 54-121 (statements of Virginia Albrecht, Reed Hopper, Nancie Marzulla, and Raymond Smethurst).

clarity and consistency to the Corps' regulatory definition of waters of the United States.

IV. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND HAS CREATED CONFUSION AND AMBIGUITY OVER THE SCOPE OF FEDERAL REGULATION

Unfortunately, the lower courts have not succeeded in bringing clarity and certainty to these important jurisdictional issues. For example, the U.S. Court of Appeals for the Fifth Circuit has expressly rejected the expansive interpretation of Clean Water Act jurisdiction of the court below. *See Needham,* 2003 WL 22953383. In *Needham*, as in this case, the United States urged the court to regulate all tributaries of traditional navigable waters, and to include in the definition of tributary all waters, excluding groundwater, that have any hydrological connection with "navigable water." *Id.* at *3. Unlike the Fourth Circuit, the Fifth Circuit rejected that interpretation of the Act.

> In our view, this definition is unsustainable under *SWANCC*. The CWA and OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the

> body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269.

Id.

With inconsistent interpretations of the Clean Water Act by different Circuit Courts of Appeals, landowners throughout the United States do not know what activities they may lawfully undertake on their property, Corps officials are left to make arbitrary and inconsistent determinations, and a landowner's only recourse is to the courts and, ultimately, to this Court.

The current state of the law regarding federal jurisdiction under the Clean Water Act is untenable not only for the regulated community, but also for regulators and reviewing courts. The degree of discretion granted by the decision below to individual Corps officials increases the complexity of a program that already is highly controversial and makes the job of the regulators even more difficult to carry out. The decision below will lead to more, not fewer, inconsistent decisions and more, not fewer, legal challenges that will further burden the judicial system. To avoid this outcome and provide clarity to the scope of federal jurisdiction under the Clean Water Act, this Court should grant certiorari.

CONCLUSION

Arbitrary and inconsistent decision-making is not acceptable under the American rule of law. Just as Congress may not delegate standardless authority to executive branch officials to regulate private property, federal agencies and courts may not interpret grants of authority from Congress in ways that lead to essentially standardless implementation of statutes. Federal jurisdiction over private property is not

whatever a Corps official says it is. Yet that is how the decision below interprets the Clean Water Act. This Court should grant certiorari to overturn that interpretation and articulate a clear standard for imposing federal jurisdiction that is consistent with the language and structure of the Act.

DATED: January 30, 2004

Respectfully submitted,

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